Local Union No. 100 of the Laborers International Union of North America, AFL-CIO *and* Jo Ba Construction Co., Inc. and International Union of Operating Engineers Local 520, AFL-CIO. Case 14-CD-675

9 September 1983

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Jo Ba Construction Co., Inc., herein called the Employer, alleging that Local Union No. 100 of the Laborers International Union of North America, AFL-CIO, herein called Respondent, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Union of Operating Engineers Local 520, AFL-CIO, herein called the Operating Engineers.

Pursuant to notice, a hearing was held before Hearing Officer Thomas J. Tobey on 28 April 1983.[1] All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[2] No party filed a brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.[3]

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Michigan corporation with its principal place of business in Southgate, Michigan, and an office located in Sauget, Illinois, is engaged in providing nonretail services within the construction industry. During the past year, the Employer purchased and received goods from outside the State having a value in excess of $50,000. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that International Union of Operating Engineers Local 520, AFL-CIO, and Local Union Number 100 of the Laborers International Union of North America, AFL-CIO, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

Jo Ba Construction Co., Inc., is engaged in providing nonretail services in the construction industry in Sauget, Illinois, including the excavation and installation of a dewatering system in the construction of the American Bottoms Regional Waste Water project.[4] In January, the Employer entered into collective-bargaining agreements with Respondent and the Operating Engineers. Members of both Unions worked on the installation of the dewatering system. On 1 April, the Employer notified the Operating Engineers that the system would commence operation on 4 April and that employees represented by the Operating Engineers were being assigned the tasks of operating and manning the pumps pursuant to the collective-bargaining agreement. The operation and the manning of the pumps consist of pushing a button to activate the pumps and then listening to assure they are operating. If a pump breaks down, it automatically shuts down and the individual is required only to notify a supervisor or the person working the next shift.

On 4 April, the laborers' foreman asked the Employer if arrangements had been made to have employees represented by the Laborers on the dewatering system. After being informed by the Employer that operating engineers, not laborers, would be manning the pumps, the laborers' foreman called the laborers together and they left the jobsite.

When the laborers had not returned by 6 April, the Employer called Respondent's office in an attempt to settle the dispute. Respondent's business

[1] All dates herein are 1983 unless otherwise indicated.

[2] While the Operating Engineers had a representative present at the hearing, the representative did not actively participate. Respondent's attorney, however, stated that he also represents the Operating Engineers.

[3] At the hearing, Respondent made a motion that the hearing be vacated and a new hearing commenced due to remarks made by the Employer's attorney concerning the behavior of Respondent's attorney. The Hearing Officer referred this motion to the Board for ruling and proceeded with the conduct of the hearing. As we find that the Hearing Officer's rulings concerning this matter are free from prejudicial error, Respondent's motion to vacate the hearing due to an alleged prejudicial ruling is hereby denied.

[4] A dewatering system is needed to lower the water table to allow excavation. Electric submersible pumps are lowered into the wells and attached to discharge pipes which extend from the well to some point off the construction site.

representative indicated that the only way to resolve the dispute was to place a laborer on the dewatering system. Due to the absence of the laborers, work on the project was suspended until 25 April when the Employer assigned a laborer to man the pump along with an operating engineer. Presently there is a member of each Union assigned to man the dewatering system.

B. *The Work in Dispute*

The work in dispute involves manning submersible electric pumps at the construction site of the American Bottoms Regional Waste Water facility at Sauget, Illinois.

C. *The Contentions of the Parties*

Respondent takes the position that there is no jurisdictional dispute in this case as it does not claim any particular work with respect to the operation of submersible electric pumps. Rather, Respondent maintains it is attempting to compel the Employer to comply with the collective-bargaining agreement entered into between Respondent and the Employer which requires the Employer to employ an employee represented by Respondent when dewatering operations are in progress.

The Operating Engineers takes the position that it has no dispute with Respondent over any work which the Employer is performing.[5]

The Employer contends that a jurisdictional dispute exists and the case is properly before the Board for determination. As to the merits, it asserts that the assignment of the work in dispute was based upon the collective-bargaining agreement the Employer has entered into with the Operating Engineers, past practice, efficiency of operation, and a prior arbitration proceeding.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.

We find no merit in Respondent's contention that no dispute exists because it is not claiming any particular work with respect to the operation of the submersible electric pumps or in the Operating Engineers position that it has no dispute with Respondent over any work the Employer is performing. These purported disclaimers, if effective, would require payment for two groups of employees, while only one group performs the work. As set forth by the Ninth Circuit:

> The fact that one union has the jobs and holds on to them in a polite, nonbelligerent manner while the other union uses the forbidden tactics in an effort to get them, or get some of them, does not mean that what Congress regarded as the evils of a jurisdictional dispute are not present. And the fact that the union which has the job is not unwilling that the other union should come in and do some of the work and get paid for doing it, if the first union will still continue to get paid for the work, does not remove the situation from the category of jurisdictional dispute. [*International Brotherhood of Carpenters and Joiners of America v. C. J. Montag & Sons, Inc.*, 335 F.2d 216, 219–221 (1964), cert. denied 379 U.S. 999 (1965).][6]

We therefore find that the purported disclaimers of Respondent and the Operating Engineers were not effective to extinguish the jurisdictional dispute between the employees of the two Unions relating to who would man the submersible electric pumps.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Further, the parties have stipulated, and there is no evidence to the contrary, that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.[7]

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[9]

The following factors are relevant in making the determination of the dispute before us:

[5] This position was proffered by Respondent's attorney.

[6] This view was endorsed by the Board in *Longshoremen ILA Local 1291 (Pocahontas Steamship Co.)*, 152 NLRB 676, 680 (1965), affd. 368 F.2d 107 (3d Cir. 1966), cert. denied 386 U.S. 1033 (1967).

[7] In light of this finding, the Employer's motion for "summary verdict," made at the hearing, is hereby denied.

[8] *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting System)*, 364 U.S. 573 (1961).

[9] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

1. Collective-bargaining agreements

The Employer has a current collective-bargaining agreement with the Operating Engineers which was entered into on 1 August 1981. This contract, which was entered in evidence, states that the jurisdiction of the Operating Engineers shall include "the control over the operation of all . . . pumps . . . or any machine that develops power."

The Employer also has a current collective-bargaining agreement with Respondent which was entered into on 21 January 1983. This contract, which was entered into evidence, states that the jurisdiction of Respondent shall include "The installation and maintenance of all de-watering equipment."

While the provisions of Respondent's contract could arguably cover the disputed work, it appears that the contract between the Operating Engineers and the Employer clearly and unambiguously covers the "operation" of the pumps.

Accordingly, we find that, in light of the specific language in the collective-bargaining agreement between the Employer and the Operating Engineers, this factor weighs in favor of awarding the work to employees represented by the Operating Engineers.

2. Employer assignment and practice

John Wyke, representing the Employer, testified that during the almost 30 years it has been in existence it has never employed laborers to man the electric pumps but rather has assigned operating engineers to perform this task. The Employer is satisfied with the results of its assignment and prefers that operating engineers continue to do the work. Thus, the factors of employer assignment and practice clearly weigh in favor of awarding the work to employees represented by the Operating Engineers.

3. Area practice

Ronald Shevlin, a representative of Respondent, testified that many different contractors performing dewatering jobs within the territory and jurisdiction of Respondent employed laborers in the operation of dewatering systems. John Wyke testified that, in his experience, the operation of "motors, engines, and the like" is normally assigned to operating engineers. Thus, area practice favors neither Respondent nor the Operating Engineers in this dispute.

4. Employee skills and efficiency of operation

The record indicates that both groups of employees possess the necessary skills to perform the manning of submersible electric pumps. However, the Employer testified that the operating engineers commence operation of the pump, and once the pumps are operational there is no further work to be performed on the system. Thus, it appears that while employee skills favor neither Respondent nor the Operating Engineers, efficiency of operation favors assignment of the disputed work to employees represented by the Operating Engineers.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Operating Engineers are entitled to perform the work in dispute.[10] We reach this conclusion relying on the collective-bargaining agreements, employer assignment and practice, and efficiency of operation. In making this determination, we are awarding the work in question to employees who are represented by Operating Engineers Local 520, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of Jo Ba Construction Co., who are represented by International Union of Operating Engineers Local 520, AFL-CIO, are entitled to perform the work of manning the submersible electric pumps at the construction site of the American Bottoms Regional Waste facility in Sauget, Illinois.

2. Local Union No. 100 of the Laborers International Union of North America, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Jo Ba Construction Co., Inc., to assign the disputed work to employees represented by that labor organization.

[10] The Employer also contends that its decision to assign the work in dispute to employees represented by the Operating Engineers was based on a prior arbitration decision. This arbitration decision, which was entered into evidence, concerned a different employer who apparently had entered into collective-bargaining agreements similar to the ones in the instant case. However, contrary testimony concerning the facts surrounding this arbitration was offered at the hearing in the instant case. Inasmuch as the factors set forth above provide a sufficient basis for our award of the disputed work, it is unnecessary to explore the effect of this arbitration decision.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local Union No. 100 of the Laborers International Union of North America, AFL-CIO, shall notify the Regional Director for Region 14, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.